JD(ATL)–3–12
Dallas, TX
Balch Springs, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

HARGROVE ELECTRIC CO., INC.
Respondent

and **Case 16-CA-27812**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 20,
Charging Party

ALMAN CONSTRUCTION SERVICES, LP
Respondent

and **Case 16-CA-27813**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 20,
Charging Party

BOGGS ELECTRIC CO., INC.
Respondent

and **Case 16-CA-27814**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 20,
Charging Party

Linda Reeder, Esq., for the General Counsel.
Howard M. Kastrinsky, Esq., of Nashville, TN, for the Respondent.
G. William Baab, Esq., of Dallas, TX, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Fort Worth, Texas, on October 11, 2011. On December 22, 2010, the International Brotherhood of Electrical Workers, Local Union 20 (the Union) filed charges against Hargrove Electric Co., Inc. (Respondent Hargrove), Alman Construction Services LP (Respondent Alman), and Boggs Electric Co., Inc. (Respondent Boggs) and the Acting Regional Director for Region 16 of the National Labor Relations Board (the Board) issued a complaint against the Respondents on June 30, 2011.

Generally, the complaint alleges that after the Union was certified as the exclusive collective-bargaining representative for certain employees employed by Respondents Hargrove, Alman, and Boggs, the Respondents made changes in terms and conditions of employment without first bargaining with the Union to a good-faith impasse.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, the Union, and the Respondents, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Hargrove, a corporation, with an office and place of business in Dallas, Texas, has been engaged in the business of electrical construction and maintenance. During the past 12 months, Respondent Hargrove, in conducting its business operations, has provided services valued in excess of $50,000 in states other than the State of Texas. Respondent Alman, a corporation, with an office and place of business in Dallas, Texas, has been engaged in the business of electrical contracting. During the calendar year ending December 31, 2010, Respondent Alman, in the course of conducting its business operation, sold goods or performed services valued in excess of $50,000 in states other than the State of Texas. Respondent Boggs, a corporation, with an office and place of business in Balch Springs, Texas, has been engaged in the business of commercial and industrial electrical construction. During the past 12 months, Respondent Boggs, in the course of conducting its business, purchased goods and materials or performed services valued in excess of $50,000 to Bell Helicopter, an enterprise directly engaged in interstate commerce. Respondents Hargrove, Alman, and Boggs admit, and I find that they are employers engaged in commerce within the meaning of Section 2(1), (6), and (7) of the National Labor Relations Act (the Act.). Respondents Hargrove, Alman, and Boggs admit, and I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

There is no dispute that Respondents Hargrove, Alman, and Boggs implemented certain changes in terms and conditions of employment for their employees after the Union attained 9(a) status for the Respondents; employees. The primary issue is whether they could lawfully implement these changes because the changes were first announced during the time that the Respondents enjoyed an 8(f) relationship with the Union. A second issue is whether the Respondents could lawfully discontinue dues deduction after the expiration of the parties' agreements.

B. Background and Facts

1. Respondents' February 6, 2008 letters

All three Respondents have maintained a bargaining relationship with the Union for at least 25 years. Respondent Hargrove's relationship with the Union has continued for as long as 48 years. In January 2008, all three Respondents individually signed letters of assent with the Union, agreeing to comply with all provisions of the December 1, 2007 – November 30, 2010 Inside Agreement between the Union and the Dallas/Ft. Worth Division North Texas Chapter, National Electrical Contractors Association (NECA.) By letters dated February 6, 2008, all three Respondents notified the Union that while they would abide by the terms of the 8(f) inside agreement until its expiration on November 30, 2010, they did not intend to be bound by any subsequently approved agreements or addenda between North Texas Chapter, NECA, and the Union. Each Respondent stated that they would institute new terms and conditions of employment for its electrical employees effective December 11, 2010.

Each of the Respondents' letters listed their proposed changes in terms and conditions of employment. Respondent Hargrove's letter provided for reductions in journeymen pay, holiday pay, health and welfare contributions and annuity contributions. Respondent Alman's letter listed lower pay for journeymen, apprentices, construction wiremen, and construction electricians. The letter also provided for a reduction in the holiday rate of pay, a reduction in annuity fund payments for journeymen and apprentices, as well as a reduction in health and welfare contributions for journeymen, apprentices, and construction electricians. Respondent Boggs' letter also provided for a reduction in journeymen pay, holiday pay, annuity fund contributions for journeymen and apprentices, as well as a reduction in health and welfare contributions for journeymen, apprentices, and construction electricians. In each letter, the Respondents added that their decisions on all other matters would be made at their sole discretion and that they would "not honor any terms from the expired Section 8(f) contract."

In its posthearing brief, the Union asserts that none of the individual letters sent by the respective Respondents included anything about a decision to cease dues deductions pursuant to voluntary written authorizations or a decision that the Respondents would cease recognizing the contractual grievance procedure.

2. The Union's response to Respondents' letters

Respondents contend that almost immediately after the Respondents issued the February 6, 2008 letters, the Union filed grievances against Respondents Alman and Boggs. The February 7, 2008 grievances alleged that the February 6, 2008 letters violated the "basic principles" of the inside agreement, as well as specific contract sections dealing with agreement duration, agreement changes, and union recognition. The Union demanded that Respondents Alman and Boggs cease "bad faith bargaining" and demanded that the Respondents "recognize that the employer has an obligation to negotiate with the union for a successor agreement." The record reflects that Respondents Alman and Boggs denied the grievances on February 13 and February 15, respectively. There is no evidence that the grievances were pursued by the Union. The Respondents contend that there is no evidence that the Union requested in 2008 to bargain with any of the Respondents over the intended changes.

Union Business Manager A.C. McAfee testified that after he received the February 6, 2008 letters, he notified the Respondents' employees about the Respondents' letters and the intended changes. McAfee testified that the employees reported that each Respondent told them that the letters were just initial proposals for bargaining. He explained that because the employees weren't concerned about the letters, he had not been "too concerned" about the letters.

3. The Union's 9(a) certifications

Before the 8(f) agreement was scheduled to expire on November 30, 2010, the Union was certified as the 9(a) representative of the Respondents' employees.[1] Specifically, the Union was certified as the 9(a) representative of Respondent Boggs' electrical employees on October 6, 2008. On April 30, 2009, the Union was certified as the 9(a) representative of Respondent Hargrove's electrical employees and on October 30, 2009, the Union was certified as the 9(a) representative of Respondent Alman's electrical employees.

4. Respondents' notice of revocation

On August 9, 2010, Respondent Alman and Respondent Boggs sent notice to the Union that they were revoking their Letters of Assent and also served notice of their intent to terminate the present contract between the Local Union and the Respondents. An identical letter was sent to the Union by Respondent Hargrove on August 13, 2010. On August 16, 2010, the Union sent letters to each Respondent seeking to open negotiations for a new contract. In each letter, the Union also confirmed that the inside agreement between the Union and the Dallas/Fort Worth Division, North Texas Chapter, NECA would be terminated on November 30, 2010.

[1] Each certified bargaining unit includes all nonsupervisory general foremen, non-supervisory Foremen, journeymen electricians, apprentice electricians, construction wiremen, and construction electricians and excludes office clerical employees, guards and supervisors as defined in the Act.

5. Negotiations

On August 27, 2010, each Respondent, through Attorney Michael Osterle, notified the Union, in writing, that the terms and conditions listed in the February 6, 2008 letters constituted each Respondent's initial proposal and that each Respondent reserved the right to withdraw, alter, or amend any proposal made during the course of negotiations. On November 11, 2010, Respondent Boggs and Respondent Alman presented their initial written proposals to the Union. On November 16, 2010, Respondent Hargrove presented its initial written proposal to the Union. Counsel for the Acting General Counsel asserts that each of the written proposals were more detailed and contained more proposals than those listed in each Respondent's letter of February 6, 2008. Specifically, counsel for the Acting General Counsel points out that all of Respondents' written proposals contained, among other items, a no-strike clause, a grievance procedure, a management-rights clause, a favored nations clause, injury time lost, a comprehensive apprenticeship program, a show-up time clause, and clauses pertaining to tools to be provided by each Respondent and by the employee, as well as travel time and travel expenses clauses. The written proposals also included a provision for a grievance/arbitration procedure and for the Respondents' contributions to the Union's health and benefit trust fund, as well as contributions to the annuity plan. The Respondent's negotiator also told the Union that once an agreement was reached, the Respondents would initiate dues deduction.

6. The Respondents' changes in terms and conditions of employment

On November 30, 2010, each Respondent sent the Union a 10-day notice of termination of the inside agreement. In each letter, the respective Respondent informed the Union that the agreement would have no force or effect after December 10, 2010.

On or about December 11, 2010, Respondent Alman terminated the inside agreement and changed the employees' terms and conditions of employment. Respondent Alman does not deny that it made the following changes: (1) implemented a reduced wage rate for new employees; (2) ceased making payments to the National Electrical Benefit Fund; (3) reduced the amount paid to the annuity fund; (3) ceased dues deduction for employees; and (4) ceased vacation deductions. Respondent Alman admits that when it made these changes, it was not at impasse with the Union in contract negotiations.

On or about December 11, 2010, Respondent Boggs also terminated the inside agreement and changed its employees' terms and conditions of employment. Respondent Boggs does not deny that it made the following changes: (1) implemented a new wage scale for new employees; (2) ceased vacation deductions; (3) ceased dues deductions; and (4) ceased recognizing the grievance procedure. Respondent Boggs admits that at the time that it made these changes, it was not at impasse with the Union in contract negotiations.

Also on December 11, 2010, Respondent Hargrove terminated the inside agreement and changed employees' terms and conditions of employment. Respondent Hargrove does not deny that it made the following changes: (1) implemented a reduced wage rate for newly hired employees; (2) ceased dues deduction; and (3) ceased recognizing the grievance

procedure. Respondent Hargrove admits that at the time it made these changes, it was not at impasse with the Union in contract negotiations.

On December 15, 2010, the Union objected to the announced changes and notified each Respondent that its members had advised the Union of Respondents' stated intent to "unilaterally implement lesser terms and conditions of employment for electricians, without bargaining in good faith impasse concerning those changed terms and conditions" and that the Union would treat such implementation as an unfair labor practice and respond accordingly.

C. Summary and Conclusions Concerning the Alleged Unilateral Changes

As discussed above, there is no dispute that the Respondents made changes in terms and conditions of employment on or about December 11, 2010, without bargaining to impasse with the Union. The Acting General Counsel asserts that in making the changes described above on or about December 11, 2010, Respondents Hargrove, Alman, and Boggs have failed and refused to bargain collectively and in good faith with the exclusive bargaining representative of their employees in violation of Section 8(a)(5) and (1) of the Act. The Respondents, however, maintain that they did not violate the Act by implementing changes they announced in February 2008, when they were 8(f) employers and before the Union became the 9(a) representative.

1. Prevailing legal authority

As the Union points out in its posthearing brief, a longstanding rule prohibits an employer from implementing unilateral changes in terms and conditions of employment without first bargaining in good faith to impasse with a certified representative of its bargaining unit employees. *NLRB v. Katz*, 369 U.S. 736 (1962). The Court has further explained that "it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton Financial Printing Division. v. NLRB*, 501 U.S. 190, 198 (1991). In the instant case, the Respondents do not dispute that the December 11, 2010 actions affected their employees' terms and conditions of employment. Respondents rely however, on the fact that initial changes were announced during the period when the Respondents enjoyed an 8(f) relationship with the Union and not a 9(a) relationship.

Under Section 9(a) of the Act, employers are obligated to bargain only with Unions that have been "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." 29 U.S.C. § 159. Furthermore, a 9(a) relationship, and the associated obligation to bargain with the Union, continues upon the expiration of a collective-bargaining agreement between the employer and the union, unless or until the union is shown to have lost majority support. *Levitz Furniture Co*., 333 NLRB 717 (2001).

In the construction industry, however, there is an exception to the requirement that the union have majority support of the bargaining unit employees. Under this limited exception, an employer may sign a "prehire" agreement with a union regardless of whether a majority of

the employees support the union's representation. 29 U.S.C. § 158 (f). The exception was designed to accommodate the unique situation in the industry where contractors and subcontractors are in close relationship on the jobsite, employment is sporadic in nature, and the employers need a ready supply of skilled employees and advance information concerning labor costs. *Los Angeles Building & Construction Trades Council*, 239 NLRB 264, 269 (1978). Thus, the distinction between a union's representative status under Section 8(f) and under Section 9(a) is significant because an 8(f) relationship may be terminated by either the union or the employer upon the expiration of their collective-bargaining agreement. *John Deklewa & Sons*, 282 NLRB 1375, 1386-1387 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). Specifically, the Board has continued to hold that when the parties' bargaining relationship is governed by Section 8(f), either party is free to repudiate the collective-bargaining relationship and decline to negotiate or adopt a successor agreement once the contract expires. *Oklahoma Fixture Co*., 333 NLRB 804, 807 (2001), enf. denied74 Fed. Appx. 31 (10th Cir. 2003).

2. Whether the parties' 8(f) relationship has converted to a 9(a)

The Respondents argue that they honored their 8(f) agreements with the Union through the term of those agreements. The Respondents assert, however, that consistent with their notice to the Union on February 6, 2008, they repudiated their 8(f) agreements when those agreements terminated and they implemented new terms. Respondents argue that because the implementation of the new terms was permissible under *Deklewa*, the Respondents did not violate Section 8(a)(5) of the Act. The Acting General Counsel, however, submits that the Union became the 9(a) representative during the term of the 8(f) agreement and well before the Respondents implemented any of the changes.[2] Counsel for the Acting General Counsel asserts that upon the Union's certification as 9(a) representative, the 8(f) agreement converted to a 9(a) agreement and was vested with the "full effect" of a 9(a) collective-bargaining agreement. Citing *Staunton Fuel & Material, Inc*., 335 NLRB 717, 719 (2001) and *VFL Technology Corp*., 329 NLRB 458 (1999), the Union argues that once the conversion occurs, the contract and the relationship must be respected and treated according to the law governing Section 9(a).

Counsel for the Respondents submit that there is longstanding Board precedent that establishes that employers have the right to implement new terms after the termination of their 8(f) agreements because they announced such terms before the Union became their employees' Section 9(a) representative. In support of this argument, the Respondents rely heavily on the Board's holding in *Starcraft Aerospace, Inc*., 346 NLRB 1228, 1230 (2006). In *Starcraft*, the Board did not find that the employer violated the Act by laying off unit employees after the employees selected the union as their bargaining representative. The Board in *Starcraft* explained that generally an employer violates the Act by unilaterally implementing changes in the terms and conditions of employment of its represented employees without satisfying its bargaining obligation. Citing its earlier decisions in *SGS*

[2] Under the Board's decision in *Deklewa*, a construction union with an 8(f) relationship with an employer can achieve 9(a) status either through a 9(a) certification proceeding or from an employer's voluntary recognition based on a clear showing that the union has majority support among the unit employees. *Deklewa* at 1387 fn. 53.

Control Services,[3] 334 NLRB 858, 861 (2001) and *Consolidated Printers*,[4] 305 NLRB 1061 fn. 2 (1992), the Board went on to clarify, however, that if the employer makes a decision to implement a change before being obligated to bargain with the union, the employer "does not violate Section 8(a)(5) by its later implementation of that change." *Starcraft* at 1230.

Counsel for the Acting General Counsel suggests that cases such as *Starcraft*, *SGS Control*, and *Consolidated Printers* are clearly distinguishable from the facts of this case. Counsel argues that unlike the instant case where the Union previously held 8(f) status, the unions involved in *Starcraft*, *SGS Control*, and *Consolidated Printers* were not 8(f) representatives before obtaining 9(a) status. Thus, the Acting General Counsel argues that in those cases, there was no conversion of the Union's status from Section 8(f) to Section 9(a) and no corresponding obligation to bargain to impasse. The Union also points out that *Starcraft* and *SGS Control* are inapplicable to the issues presented in this case because of the conversion of the Union's relationship and contracts with the Respondents to a 9(a) status. The Union contends that *Starcraft* and *SGS Controls* do not "involve, speak to, or discuss the factual circumstances of conversation from 8(f) relationships and contracts to 9(a) relationships and contracts.

The Union also argues that at the time that the employers made the decisions in the cases cited by Respondent, the employers had the absolute right to implement those unilateral changes because there was no identified bargaining representative and no collective-bargaining relationship in place. In the instant case, however, Respondents Hargrove, Alman, and Boggs could not have implemented any of these changes at the time of February 6, 2008 announcement. As counsel for the Union points out, they were "involved in a consensual Section 8(f) relationship and each was bound by a collective bargaining agreement which, by its nature and legal effect, prohibited alteration of terms and conditions of employment for the term of the contract." Counsel asserts that the right of each of these Respondents to effect a unilateral change in 2010 was completely dependent on the continuation of their 8(f) relationship with the Union and the expiration of the 8(f) agreement. The Union asserts that these contingencies were never satisfied because the relationship converted to a 9(a) relationship and the contract converted to a 9(a) contract.

Citing *VFL Technology Corp*., 329 NLRB 458, 459 (1999), counsel for the Acting General Counsel also asserts that when a union attains 9(a) status during the term of a 8(f) agreement, the relationship becomes a 9(a) relationship and the employer is therefore bound by the postexpiration bargaining obligations of Section 9(a). In *VFL Technology,* the Board held that once a 9(a) bargaining status is created, a preexisting 8(f) prehire agreement between the parties becomes a 9(a) agreement from that point forward, even if the parties do not negotiate a new contract subsequent to the 9(a) recognition agreement. Id at 459. Although the issue in *VFL Technology* involved a question of whether the newly established 9(a) status barred a rival union petition, I find the premise to be the same as that advanced by the Acting

[3] The Board found that the employer's unilateral change in its overtime policy did not violate the Act as the decision for the change was made prior to the election.

[4] The Board found that the employer's unilateral layoff of employees did not violate the Act as the decision was made prior to the time that the employer was obligated to bargain with the union.

General Counsel in the instant case. The conversion of the parties' relationship to a 9(a) relationship negated the rights and obligations that applied to the previous 8(f) relationship.

Furthermore, counsel for the Acting General Counsel points out that the Board's decisions in *Starcraft*, *SGS Control*, and *Consolidated Printers* made it clear that an employer must show that it made "a firm decision" to implement the changes prior to the establishment of the 9(a) relationship in order to lawfully implement the changes after the establishment of a 9(a) relationship. There is no dispute that the Respondents implemented only part of the changes they initially announced in February 2008. The Acting General Counsel contends that the "piecemeal" implementation of announced changes indicates that the announced changes were not clear decisions and cites the Board's decision in *Tocco, Inc*., 323 NLRB 480 fn. 2 (1997). Distinguishing the facts from *Consolidated Printers*, the Board in *Tocco* found no evidence that the employer had made a clear decision to effect a change prior to the employer's obligation.

With respect to whether there was a piecemeal implementation of the changes announced in February 2008, the Respondents assert that there is no requirement under the Act that an employer implement all or any of the announced changes in such circumstances. Respondent also points to the fact that each of the February 6, 208 letters stated, "We will not honor any terms from the expired Section 8(f) contract." Respondents argue that the Acting General Counsel's objection that Respondents did not list everything they implemented is meritless. Although I agree that there is no requirement that compels an employer to implement changes exactly as they are announced, the overall evidence does not reflect that the Respondents' 2008 announced changes demonstrated the same specificity of intent as those announced changes found in *Starcraft, SGS Control*, and *Consolidated Printers*. Specifically, on August 27, 2010, Attorney Michael Osterle sent a letter to the Union on behalf of each Respondent. He notified the Union that he was the designated representative for each Respondent and their respective bargaining committees. More importantly, he confirmed that the terms and conditions established by the February 6, 2008 letters constituted the Respondents' initial proposal for bargaining. The language of this letter reflects that the changes identified in the February 6, 2008 letter were not "firm decisions;" but were simply proposed changes that the Respondents were incorporating in the bargaining process. Accordingly, the letter of August 27, 2010, clarifies that the facts of the instant case are distinguishable from those facts considered by the Board in *Starcraft*, *SGS Control,* and *Consolidated Printers*.

In summary, I do not find that the Respondents were privileged to make the unilateral changes of December 11, 2010 based upon their February 6, 2008 announcement of proposed changes. Although the Respondents may have been privileged to implement such changes after the termination of the 8(f) agreement and if the bargaining relationship had continued as an 8(f) relationship; this was not the case. The relationship between the Respondents and the Union converted to a 9(a) relationship in 2009; triggering the Respondents' bargaining obligations under 9(a) of the Act. As the Board pointed out in *VFL Technology*, once the 9(a) relationship is established, the 8(f) contract becomes a 9(a) contract from that point forward. *VFL Technology* at 459. Accordingly, any proposed changes could not be unilaterally implemented without first bargaining in good faith to impasse with the Union. *NLRB v. Katz,*

369 U.S. 736 (1962). Furthermore, inasmuch as the Respondents' bargaining representative acknowledges that such proposed changes were simply initial bargaining proposals, there is insufficient evidence that the February 6, 2008 letters constituted an announcement of a firm decision to implement the changes that were in fact implemented on or about December 11, 2010. Accordingly, I find that by unilaterally implementing the changes in terms and conditions of employment on or about December 11, 2010, Respondents Hargrove, Alman, and Boggs violated Section 8(a)(5) and (1) of the Act.

D. The Respondents' Discontinuance of Dues Deductions

There is no dispute that the Respondents maintained contractually-authorized deduction of union dues until the termination of the inside agreement on December 11, 2010, and thereafter the Respondents discontinued dues deduction. Respondents assert that they were permitted to do so under the Board's decision in *Bethlehem Steel*, 136 NLRB 1500 (1962), and its progeny. The Respondents also cite the Board's more recent decision in *Hacienda Resort Hotel & Casino* (*Hacienda III*), 355 NLRB No. 154 (2010); where the Board on a second remand from the Ninth Circuit Court of Appeals reaffirmed the precedent in the absence of a three-member majority to overrule the precedent.

As discussed above, the Supreme Court has long held that an employer violates Section 8(a)(5) of the Act by unilaterally changing a term or condition of employment without bargaining with the exclusive collective-bargaining representative of its employees. *NLRB v. Katz,* 369 U.S. 736, 743 (1962). In its decision in *Bethlehem Steel*, the Board confirmed that union security and dues checkoff are matters related to wages, hours, and other terms and conditions of employment within the meaning of Section 8(d) of the Act, and therefore are mandatory subjects of bargaining about which the employer must bargain with the union. The Board went on to explain, however, that certain terms of a contract, including union dues deduction agreements, may be terminated after the expiration of a contract. The Board opined that the checkoff provisions in the employer's contract with the union implemented the union-security provisions. The Board noted that the union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force. *Bethlehem Steel* at 1502. In its decision in *Tampa Sheet Metal Co*., 288 NLRB 322, 326 fn. 15 (1988), the Board again explained that an employer's cessation of union dues checkoff after the expiration of the contract was not unlawful. Thus, the precedent finding that an employer's duty to check off union dues is extinguished upon the expiration of the collective-bargaining agreement which created the duty, and as established in *Bethlehem Steel*, has continued to be affirmed in both the Board and the United States Courts of Appeal decisions.[5] The precedent was even implicitly approved in the Court's dicta in *Litton Financial Printing v. NLRB*, 501 U.S. 190, 191 (1991). In *Litton*, the Court noted that while the Board had ruled that most mandatory subjects of bargaining are within the *Katz* prohibition on unilateral changes, the Board had also identified some terms and conditions of employment that did not survive the expiration of an agreement. Citing the Board's decisions in *Indiana & Michigan*

[5] *Sullivan Bros. Printers, Inc. v. NLRB*, 99 F.3d 1217, 1232 (1st Cir. 1996); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986); *Ortiz Funeral Home Corp*., 250 NLRB 730 (1980), enfd. 651 F.2d 136 (2nd Cir. 1981); *Peerless Roofing Co., Ltd*., 247 NLRB 500 (1980).

Electric Co., 284 NLRB 53, 55 (1987) and *Bethlehem Steel,* 136 NLRB at 1502, the Court observed the Board's view that union security and dues-checkoff provisions are excluded from the unilateral change doctrine. *Litton* at 199.

In 2010 and on remand for the second time from the Ninth Circuit Court of Appeals, the Board issued its decision in *Hacienda Resort Hotel & Casino*, (Hacienda III), 355 NLRB No. 154. Specifically in its instruction to the Board, the court stated: "the question squarely in front of the Board is whether dues-checkoff in right-to-work states is subject to unilateral change or whether under such circumstances, dues-checkoff is a mandatory subject of bargaining." *Local Joint Executive Board of Las Vegas*, 540 F.3d 1072, 1082. (9th Cir. 2008).

In a decision that issued on August 27, 2010, the Board explained that after having carefully considered the court's remand, the four members of the Board eligible to participate in the decision had reached opposing views, as reflected in their separate opinions. The Board further explained that in view of the deadlock the members had determined to follow existing precedent.

In their concurring opinion, Chairman Liebman and Member Pearce expressed substantial doubts about the validity of *Bethlehem Steel* and its progeny, particularly as applied in right-to-work states, where the collective-bargaining agreement contains no union-security arrangements. Specifically, they noted that even if *Bethlehem Steel* was correctly decided, the Board has never provided a reasoned analysis for applying the holding of *Bethlehem Steel* in a right-to-work context where dues checkoff could not lawfully be linked with union-security arrangements. They added that in an appropriate case, they would consider overruling *Bethlehem Steel* and its progeny, including *Tampa Sheet Metal*, 288 NLRB 322, 326 fn. 15 (1988). Chairman Liebman and Member Pearce also opined that a contract-based distinction between dues-checkoff contributions to contributions to pension and welfare funds is nonexistent. They explained that the economic terms of a collective-bargaining agreement, such as wage rates, are no less contractual requirements than is dues-checkoff obligation, as the agreement is the only source of the employer's obligation to provide those particular wages and benefits.

In their concurring opinion Members Schaumber and Hayes maintained that the application of the Board's rule regarding postcontract expiration of the dues-checkoff obligation is warranted. In explaining why they found a contract based distinction in dues-checkoff and other terms and conditions of employment subject to *Katz,* they explained that while provisions relating to wages, pension and welfare benefits, hours, working conditions, and numerous other mandatory bargaining subjects typically appear in collective-bargaining agreements, such aspects of employment can exist from the commencement of a bargaining relationship. They further explained that the obligation to maintain such terms and conditions of employment does not arise with, or depend on, the existence of a contract. This is contrasted wit the obligation to checkoff dues, to refrain from strikes or lockouts, and to submit grievances to arbitration that cannot exist in a bargaining relationship until the parties affirmatively contract to be so bound. Members Schaumber and Hayes added that each of these obligations arising from the contract entails a change in the ordinary scheme of statutory

rights and limitations, and thus it is reasonable to presume, absent express language to the contrary, that these obligations are coterminous with the contracts that give rise to them.

In a September 2011 decision, the Ninth Circuit took jurisdiction under 29 U. S. C. § 160(f) to review the Board's ruling. *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865, 867–868 (9th Cir. 2011). The court viewed the Board's decision in *Hacienda III* as arbitrary and capricious, opining that the Board provides no explanation for the rule it follows in reaching its decision. The court explained that while it must show deference to the Board in its promulgation of labor policy, "a third open remand is inappropriate in this case because the Board, after more than 15 years, has reached a deadlock on the merits, and continues to be unable to form a reasoned analysis in support of its ruling." The court then concluded that the employers violated Section 8(a)(5) of the Act when they unilaterally ceased dues checkoff before bargaining to impasse. The court granted the union's petition, vacated the Board's ruling, and remanded the case to the Board so that it could determine what relief is appropriate in light of the court's decision.

In its discussion of its decision, the court noted that where the dues-checkoff provisions do not implement union security, but instead exist as a free-standing independent convenience to willingly participating employees, the reasoning of *Bethlehem Steel* loses its force. The court went on to conclude "that in a right-to-work state, where dues-checkoff does not exist to implement union security, dues-checkoff is akin to any other term of employment that is a mandatory subject of bargaining." The court reasoned that because each affected employee individually requested dues checkoff, the employers' actions were an unlawful termination of a bargained benefit to employees and not merely the cessation of a provision that automatically terminated along with the collective-bargaining agreement and union security.

Counsel for the Union argues that an application of the Ninth Circuit's rationale and holding to this case requires the conclusion that Respondents' unilateral cessation of dues deduction and payment, without bargaining to good-faith impasse violates Section 8(a)(5) of the Act. In contrast, counsel for the Respondents asserts, however, that the Ninth Circuit's opinion is not applicable because the agreements in the instant case were prehire agreements negotiated by a union that did not represent a majority of the Respondents' employees.

Certainly, in the instant case, there is no corresponding union-security provision as Texas is a right-to-work state and the circumstances may be somewhat distinguishable from those before the Board in *Bethlehem*. Nevertheless, I cannot apply the Ninth Circuit's rationale as urged by counsel for the Union. Although there was not a three-member majority to overrule the precedent set by *Bethlehem Steel*, the decision in *Hacienda III* nevertheless remains the outstanding current Board law with respect to the lawfulness of an employer's cessation of dues deductions after the expiration of a contract. "It is for the Board, not the judge, to determine whether that precedent should be varied." *Waco, Inc*., 273 NLRB 746 fn. 14 (1984), citing *Iowa Beef Packers*, 144 NLRB 615, 616 (1963). Accordingly, it is my responsibility to apply established Board precedent which the Supreme Court has not reversed. *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004).

Accordingly, I find that Respondents' unilateral cessation of dues checkoff on or about December 11, 2010, did not violate Section 8(a)(5) of the Act.

Conclusions of Law

1. Respondents, Hargrove Electric Co., Inc., Alman Construction Services, LP, and Boggs Electric Co., Inc., are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local Union 20 is a labor organization within the meaning of Section 2(5) of the Act.

3. Since April 3, 2009, the Union has been the exclusive collective-bargaining representative of Respondent Hargrove's employees in the following appropriate unit:

> All non-supervisory general foremen, non-supervisory foremen, journeymen electricians, apprentice electricians, construction wiremen, and construction electricians employed by Respondent Hargrove in the geographical jurisdiction of the International Brotherhood of Electrical Workers Local Union No.20, excluding all other employees including office clerical employees, guards, and supervisors as defined in the Act.

4. Since October 30, 2009, the Union has been the exclusive collective-bargaining representative of Respondent Alman's employees in the following appropriate unit:

> All non-supervisory general foremen, non-supervisory foremen, journeymen electricians, apprentice electricians, construction wiremen, and construction electricians employed by Respondent Alman in the geographical jurisdiction of the International Brotherhood of Electrical Workers Local Union No.20, excluding all other employees including office clerical employees, guards, and supervisors as defined in the Act.

5. Since October 6, 2008, the Union has been the exclusive collective-bargaining representative of Respondent Boggs' employees in the following appropriate unit:

> All non-supervisory general foremen, non-supervisory foremen, journeymen electricians, apprentice electricians, construction wiremen, and construction electricians employed by Respondent Boggs in the geographical jurisdiction of the International Brotherhood of Electrical Workers Local Union No.20, excluding all other employees including office clerical employees, guards, and supervisors as defined in the Act.

6. By implementing a reduced wage rate for newly hired employees without bargaining with the Union to a good-faith impasse, Respondent Hargrove violated Section 8(a)(5) and (1) of the Act.

7. By ceasing to recognize the parties' grievance procedure without bargaining with the Union to a good-faith impasse, Respondent Hargrove violated Section 8(a)(5) and (1) of the Act.

8. By implementing a reduced wage rate for new employees without bargaining with the Union to a good-faith impasse, Respondent Alman violated Section 8(a)(5) and (1) of the Act.

9. By ceasing to make payments to the National Electrical Benefit Fund without bargaining with the Union to a good-faith impasse, Respondent Alman violated Section 8(a)(5) and (1) of the Act.

10. By reducing the amount paid to the Annuity Fund without bargaining with the Union to a good-faith impasse, Respondent Alman violated Section 8(a)(5) and (1) of the Act.

11. By ceasing to make vacation deductions without bargaining with the Union to a good-faith impasse, Respondent Alman violated Section 8(a)(5) and (1) of the Act.

12. By implementing a new wage scale for new employees without bargaining with the Union to a good-faith impasse, Respondent Boggs violated Section 8(a)(5) and (1) of the Act.

13. By ceasing to make vacation deductions without bargaining with the Union to a good-faith impasse, Respondent Boggs violated Section 8(a)(5) and (1) of the Act.

14. By ceasing to recognize the parties' grievance procedure without bargaining with the Union to a good-faith impasse, Respondent Boggs violated Section 8(a)(5) and (1) of the Act.

15. I do not find that Respondents Hargrove, Alman, and Boggs violated the Act in any other manner.

REMEDY

Having found that Respondents Hargrove, Alman, and Boggs violated Section 8(a)(5) and (1) of the Act by unlawfully and unilaterally implementing changes and conditions of employment, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, I recommend that the Respondents rescind the unlawful unilateral changes made to unit employees' terms and conditions of employment, and to restore the status quo ante that existed prior to the changes until such time as the Respondents bargain with the Union in good faith to a collective- bargaining agreement or a good-faith impasse.

Respondents shall make whole any unit employees affected by the unilateral changes. Such compensation shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB* 647 F.3d 1137 (D.C. Cir. 2011). The Respondents shall also make any benefit contributions on behalf of eligible unit employees that have not been made since the date of unlawful changes.

On these findings of facts and conclusions of law and on the record, I issue the following recommended

ORDER

A. The Respondent, Hargrove Electric Co., Inc., Dallas, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the unit employees' terms and conditions of employment without bargaining with the Union to a good-faith impasse.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, rescind the unlawful unilateral changes it made to the terms and conditions of employment and restore the status quo ante that existed prior to the changes until such time as it has bargained with the Union to an agreement or impasse.

(b) Make whole the unit employees for the losses they may have incurred as a result of the unilateral reduction in wage rates and for Respondent Hargrove's failure to recognize the parties' grievance procedure in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including electronic copies, necessary to analyze the amount of payments due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its current jobsites within the geographical area encompassed by the appropriate unit here and at its place of

business in Dallas, Texas, copies of the attached notice marked "Appendix A."[6] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in the proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 11, 2010. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(e) Within 21 days after service by the Region, file with the Regional Director, a sworn certificate of a responsible official on a form provided by he Region attesting to the steps that Respondent has taken to comply.

B. The Respondent Alman Construction Services, LP, Dallas, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the unit employees' terms and conditions of employment without bargaining with the Union to a good-faith impasse.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, rescind the unlawful unilateral changes it made to the terms and conditions of employment and restore the status quo ante that existed prior to the changes until such time as it has bargained with the Union to an agreement or impasse.

(b) Make whole the unit employees for the losses they may have incurred as a result of the unilateral reduction in wage rates and the cessation of vacation deductions.

(c) Make contributions to the annuity fund and to the National Electrical Benefit Fund to the extent that contributions would have been made on behalf of the unit employees in the absence of Respondent Alman's unlawful actions.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated

[6] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including electronic copies, necessary to analyze the amount of payments due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its current jobsites within the geographical area encompassed by the appropriate unit here and at its place of business in Dallas, Texas, copies of the attached notice marked "Appendix B."[7] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in the proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 11, 2010. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

C. The Respondent Boggs, Balch Springs, Texas, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the unit employees' terms and conditions of employment without bargaining with the Union to a good-faith impasse.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, rescind the unlawful unilateral changes it made to the terms and conditions of employment and restore the status quo ante that existed prior to the changes until such time as it has bargained with the Union to an agreement or impasse.

(b) Make whole the unit employees for the losses they may have incurred as a result of the unilateral implementation of a new wage scale and the unilateral cessation of

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

vacation deductions and the unilateral cessation of the recognition of the parties' grievance procedure.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including electronic copies, necessary to analyze the amount of payments due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its current jobsites within the geographical area encompassed by the appropriate unit here and at its place of business in Balch Springs, Texas facility, copies of the attached notice marked "Appendix C."[8] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in the proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 11, 2010. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., January 13, 2012.

Margaret G. Brakebusch
Administrative Law Judge

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT implement a reduced wage rate for newly hired employees without bargaining with the Union to a good-faith impasse.

WE WILL NOT cease to recognize the grievance procedure without bargaining with the Union to a good-faith impasse.

WE WILL make employees whole for any losses they may have incurred as a result of our unilateral reduction in wage rates for newly hired employees and for our ceasing to recognize the grievance procedure.

HARGROVE ELECTRIC CO., INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, Texas
(817) 978-2921, Hours: 9:15 a.m. to 5:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (713) 209–4885.

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT implement a reduced wage rate for new employees without bargaining with the Union to a good-faith impasse.

WE WILL NOT cease making payments into the National Electrical Benefit Fund without bargaining with the Union to a good-faith impasse.

WE WILL NOT change the amount paid to the Annuity Fund without bargaining with the Union to a good faith impasse.

WE WILL NOT cease making vacation deductions without bargaining with the Union to a good-faith impasse.

WE WILL make whole our employees for any losses they may have suffered as a result of our unilateral reduction in wage rates for new employees and our failure to make vacation deductions.

WE WILL make the required contributions to the National Electrical Benefit Fund and to the annuity fund and reimburse our employees for any expenses ensuing from our failure to make the required contributions to the funds.

ALMAN CONSTRUCTION SERVICES, LP
(Employer)

Dated_____ By_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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APPENDIX C

NOTICE TO EMPLOYEES
Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT implement a new wage scale for new employees without bargaining with the Union to a good-faith impasse.

WE WILL NOT cease making vacation deductions for our employees without bargaining with the Union to a good-faith impasse.

WE WILL NOT cease to recognize the parties' grievance procedure without bargaining with the Union to a good-faith impasse.

WE WILL make whole our employees for any losses suffered as a result of our unilateral implementation of a new wage scale for new employees, our failure to make vacation deductions for our employees, and for our failure to recognize the parties' grievance procedure.

BOGGS ELECTRIC CO., INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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